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No. 88-338

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

KEVIN ROBINSON,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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QUESTION PRESENTED

SHOULD THIS COURT REVIEW THE PETITIONER'S CLAIM THAT DUE PROCESS REQUIRED A LESSER INCLUDED OFFENSE INSTRUCTION WHERE THE STATE APPELLATE COURT DISPOSED OF THE CASE ON STATE PROCEDURAL DEFAULT GROUNDS, THE DEFENDANT FAILED TO RAISE THE CLAIM IN EITHER THE TRIAL COURT OR THE APPELLATE COURT, AND THE CLAIM ITSELF IS INSUBSTANTIAL ON THE MERITS?

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	1
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	iii
OPINION BELOW	vii
STATEMENT OF THE CASE	1
A. Facts and Trial Proceedings	1
B. State Appellate Proceedings	3
REASONS FOR DENIAL OF THE PETITION	7
I. THE DECISION OF THE STATE APPELLATE COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS	7
II. REVIEW IS BARRED BY THE PETITIONER'S FAILURE TO TIMELY RAISE THE FEDERAL CLAIM IN THE STATE COURTS	12
III. THE CLAIM IS INSUBSTANTIAL ON ITS MERITS	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES **PAGE**

Beck v. Alabama, 447 U.S. 625 (1980) 13, 17

Hathorn v. Lovorn, 457 U.S. 225 (1982) 11

Henry v. Mississippi, 379 U.S. 443 (1965) 11

Hopper v. Evans, 456 U.S. 605 (1982) 17, 19

Lynch v. New York, 293 U.S. 52 (1934) 12

Marinelli v. Cutarelli, 2 Conn. Cir. Ct. 15, 193 A.2d 727 (1963) . . 10

Michigan v. Tyler, 436 U.S. 499 (1978) 11

NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958) 11

State(v. Evans, 165 Conn. 61, 327 A.2d 576 (1973) 4, 14, 15

State v. Franko, 199 Conn. 481, __ A.2d __ (1986) 15

State v. Killenger, 193 Conn. 48, 475 A.2d 276 (1984) 12

State v. McIntosh, 199 Conn. 155, 506 A.2d 104 (1986) 10, 12

CASES-CONTINUED **PAGE**

State v. Merritt, 11 Conn. App. 628, 528 A.2d 863 (1987) 5, 12

State v. Ostroski, 201 Conn. 534, 518 A.2d 915 (1986) 5, 12

State v. Thurman, 10 Conn. App. 302, 523 A.2d 891 (1987) 15

State v. Whistnant, 179 Conn. 576, 427 A.2d 414 (1980) 3, 6, 7, 9

United States v. Zapata-Tamallo, 833 F.2d 25 (2d Cir. 1987) 6, 17

STATUTES

General Statutes § 53a-65(2) 18

General Statutes § 53a-70 1

General Statutes § 53a-72a 2

General Statutes § 53a-73a 2

RULES OF COURT

Practice Book § 852 10

MISCELLANEOUS

Superior Court Rules § 852 . . . . 5, 9

Superior Court Rules § 854 5

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons thereof. The following, while neither controlling nor fully measuring the Court's discretion indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way to conflict with applicable decisions of this court.

Connecticut Superior Court Rules

§ 852. Submission for Verdict--Necessity for Requests to Charge and Exceptions

The supreme court shall not be

bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection. Upon request, opportunity shall be given to present the exception out of hearing of the jury. (P.B. 1963, Sec. 2263.)

§ 854. Submission for Verdict--Form and Contents of Requests

When there are several requests, they shall be in separate and numbered paragraphs, each containing a single proposition of law clearly and concisely stated with the citation of authority upon which it is based, and the evidence

to which the proposition would apply. Requests to charge should not exceed fifteen in number unless, for good cause shown, the court permits the filing of an additional number. If the request is granted, the judicial authority shall apply the proposition of law to the facts of the case.

A principle of law should be stated in but one request and in but one way. Requests attempting to state in different forms the same principle of law as applied to a single issue are improper.

OPINION BELOW

The opinion of the Connecticut Court is reported at 14 Conn. App. 40, 539 A.2d 606 (1987), and is reproduced in the Petitioner's appendix.

STATEMENT OF THE CASE

A. Facts and Trial Proceedings

The Petitioner was convicted of sexual assault in the first degree; Connecticut General Statutes §53a-70. The victim testified that on November 11, 1984, she went to a meeting of the Naugutuck Ambulance Corps with the Petitioner, a high school classmate. After the meeting, they decided to "ride around" for a time. The Petitioner eventually pulled into a dirt road and stopped the car. He began kissing the victim. She told him to stop and take her home. Instead, however, the Petitioner pulled up the victim's shirt and she "froze". He put his mouth on her breast, pulled down her pants and his own pants. He took her leg and placed it on top of the seat. He got on top of her

and tried to separate her legs while the victim repeatedly put them together, telling him to stop and take her home. He placed his penis in her vagina. Then the victim attempted to grab hold of his hip and to push him off of her, but was unable to do so. The Petitioner said "Don't worry about it, I know its going to hurt, nobody's going to know about it." The Petitioner took the stand and denied any sexual contact with the victim.

At the close of evidence, the Petitioner submitted written requests that the trial court instruct the jury on two lesser included offenses, sexual assault in the third degree; Connecticut General Statutes § 53a-72a; and sexual assuault in the fourth degree; General Statutes § 53a-73a. The State opposed

the requests on the ground that, in light of the Petitioner's denial of the entire incident, the elements distinguishing the offense charged from the lesser included offenses were not in dispute as required. See State v. Whistnant, 179 Conn. 576, 427 A.2d 414 (1980). The Petitioner did not refer to a due process right to a lesser included offense. The trial court declined the requests and charged the jury only on sexual assault in the first degree.

B. State Appellate Proceedings

The Petitioner raised two claims in the Connecticut Appellate Court: (1) that there was insufficient evidence of the use of force to sustain a conviction for sexual assault in the first degree and (2) that the trial court erred in failing to instruct the jury on sexual

assault in the fourth degree. He not only failed to raise any due process claim at that time but, in his brief, actually conceded that there was no constitutional right to a lesser included offense instruction and thus no basis for review of the claim under the exceptional circumstances doctrine stated in State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973).[1] See Appendix at A-6.

As to the Petitioner's first claim, the Appellate Court reviewed the evidence of force and found it sufficient

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[1] Under Connecticut law, an unpreserved issue qualifies for appellate review if "the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial". State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973). The Petitioner recognized that a defect in the written request to charge could bar review on appeal but argued that the state had waived any such objection at trial.

to sustain the conviction.

It declined to review the Petitioner's second claim on procedural default grounds, finding that the request to charge submitted by the Petitioner was not in compliance with Section 852 in that it failed to state essential facts that would justify the charge requested. In accordance with the decision of the Connecticut Supreme Court in State v. Ostroski, 201 Conn. 534, 556-59, 518 A.2d 915 (1986) and its own opinion in State v. Merritt, 11 Conn. App. 628, 528 A.2d 863 (1987), the Appellate Court applied the rule that a trial court's refusal to charge the jury as requested is not erroneous where the written request fails to comply with Section 854 of the Superior Court rules. See Superior Court Rules § 852. See also

State v. Whistnant, supra at 588.

The Petitioner then moved for reargument in the Appellate Court. At that time, he asserted for the first time that due process requires a lesser included offense instruction if the evidence would permit a jury rationally to convict the defendant of the lesser offense and acquit him of the greater, quoting United States v. Zapata-Tamallo, 833 F.2d 25, 28 (2d Cir. 1987)(due process clause requires lesser included offense instruction if warranted by evidence in non-capital case).

After the motion was denied, he petitioned to the Connecticut Supreme Court for certification, again raising the due process claim. The petition for certification to the Connecticut Supreme Court was denied.

REASONS FOR DENIAL OF THE PETITION

As a result of the Petitioner's failure to timely raise the due process claim and the Appellate Court's disposition of the case on procedural default grounds, the Petition does not raise a question of federal law that was squarely addressed by a state court or that was decided in a manner conflicting with other state or federal court decisions. See Sup. Ct. R. 17.1(b).

I. THE DECISION OF THE STATE APPELLATE COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

In State v. Whistnant, 179 Conn. 576, 427 A.2d 414 (1980), the Connecticut Supreme Court established the test for determining whether a defendant is entitled to a lesser included offense instruction. Such an instruction must be given if and only if "(1) an appropriate

instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without first having committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser. " Id. at 588.

The importance attached by Connecticut courts to the submission of a

proper request to charge is evidenced not only by first prong of the Whistnant test but also by the rules of court, which provide that the appellate courts shall not be bound to consider a claim of error relating to the giving or refusal to give a jury instruction where the appellant failed to submit a written request to charge. Superior Court Rules §852.

The rules serve the legitimate purpose of facilitating the task faced by the trial court. In applying the third and fourth prongs of the Whistnant test, it must determine (1) whether the evidence would permit a conviction on only the lesser offense and (2) whether the distinguishing elements were sufficiently in dispute. If the request is granted, the court must apply the

pertinent proposition of law to the facts of the case. Superior Court Rules § 854. These tasks are rendered much simpler where the party requesting the charge identifies the evidence it claims justifies the request. As stated by the Connecticut Supreme Court in State v. McIntosh, 199 Conn. 155, 506 A.2d 104 (1986)

> The ever increasing refinement of our law justifies cooperation of counsel in stating requests for jury instructions and this cooperation is mandated, at least to the extent of substantial compliance with Practice Book § 852. The minor burden of cooperation imposed by this section is neither unreasonable nor novel. Our courts have long recognized that [an inadequate] request . . . "hinders rather than helps" the trial court in determining whether a particular instruction should be given. See Marinelli v. Cutarelli, 2 Conn. Cir. Ct. 15, 20, 193 A.2d 727 (1963) . . .

State v. McIntosh, supra at 160-61.

The Petitioner's failure to comply

with the procedural rule in question is an independent and adequate state ground barring review by this Court of the federal question raised. Hathorn v. Lovorn, 457 U.S. 225 (1982); Michigan v. Tyler, 436 U.S. 499, n. 7 (1978).

While certiorari has on occasion been granted where the procedural rule in question is irregularly enforced; NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 456 (1958); or where it serves no legitimate purpose; see Henry v. Mississippi, 379 U.S. 443 (1965), neither of these situations is presented here. The rule declining appellate review in the absence of a proper request to charge serves the legitimate interest of assisting the trial and appellate courts in determining when a lesser included offense instruction is

warranted. State v. McIntosh, supra. Moreover, it has been consistently applied by both the Connecticut Supreme and Appellate Courts. State v. Ostroski, supra; State v. McIntosh, supra, State v. Killenger, 193 Conn. 48, 57, 475 A.2d 276 (1984); State v. Merritt, 11 Conn. App. 628, 528 A.2d 863 (1987).

II. REVIEW IS BARRED BY THE PETITIONER'S FAILURE TO TIMELY RAISE THE FEDERAL CLAIM IN THE STATE COURTS

It is essential to the jurisdiction of this Court in reviewing the decision of a state court, that a federal question be presented to the state's highest court, that the question be decided and that the resolution of the federal question be essential to its determination of the case. Lynch v. New York, 293 U.S. 52, 54 (1934). None of these prerequisites has been satisfied

by the Petitioner in this case.

Although the due process clause had been first held to require a lesser included offense instruction in Beck v. Alabama, 447 U.S. 625 (1980) -- well before the trial in this matter -- the Petitioner failed to raise any constitutional claim until his motion for reargument in the Connecticut Appellate Court and his petition for certification to the Connecticut Supreme Court. These motions were denied without opinion. Accordingly, the record contains no decision of a state court addressing the federal question now raised.

Moreover, the statement of the Connecticut Appellate Court that there is no constitutional right to a lesser included offense instruction was not necessary to its resolution of the case,

but rather dicta. It simply applied the established principle that a trial court does not err in declining to charge as requested where the written request fails to comply with the rules of court. The Petitioner now makes a strained attempt to characterize that statement as the holding, by asserting that review would have been available under State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973), if the Appellate Court had recognized the constitutional ramifications of the request to charge.

The Appellate Court made no reference to State v. Evans, supra, however. Indeed, the Petitioner had conceded in his brief that Evans review was not available with respect to his second claim.

In any event, it is unlikely that

the Appellate Court would have reviewed the claim under Evans, had it been urged to do so.

First, the Connecticut Supreme Court has stated that a lesser included offense instruction may be required by the due process clause only in capital cases. State v. Franko, 199 Conn. 481, 495 n.15, 508 A.2d 22 (1986).

Second, as the Appellate Court interprets the Evans doctrine, a limited review of the record must support a defendant's assertion that the claim is truly of constitutional dimension and not merely labeled as such. State v. Thurman, 10 Conn. App. 302, 306-07, 523 A.2d 891 (1987). In light of the non-capital nature of the case, the Connecticut Supreme Court's statement in Franko and the petitioner's failure to

offer at trial a factual basis upon which the jury could have convicted him of the lesser offense, it is evident that, had the Appellate Court applied Evans analysis, it would have concluded that no right of truly constitutional dimension was implicated in the petitioner's second claim. Its broadly-stated view that there is no constitutional right to a lesser included offense was thus not necessary to its disposition of the case.

Accordingly, in light of the Petitioner's failure to timely raise the federal constitutional claim, and the absence of a state court decision squarely addressing the question, this Court should not assume jurisdiction over the matter, notwithstanding an apparent conflict with United States v

Zapata-Tamallo, 833 F.2d 25 (2d Cir. 1987).

III. THE CLAIM IS INSUBSTANTIAL ON ITS MERITS

This Court has never held that the due process clause requires a lesser included offense instruction in a non-capital case. Indeed, the rationale of this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980) was carefully limited to capital cases, stating "there is a significant constitutional difference between the death penalty and lesser punishments". Id. at 637.

Moreover, the due process clause requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. Hopper v. Evans, 456 U.S. 605 (1982). The elements distinguishing sexual

assault in the first degree and sexual assault in the fourth degree are (1) the presence or absence of force and (2) whether the assault involved "sexual intercourse" or "sexual contact" as those terms are defined in General Statutes §53a-65(2) and (3).

After reviewing the evidence, the Appellate Court concluded that the evidence of force was sufficient to support the conviction for sexual assault in the first degree. The Petitioner has not sought further review of that finding. Additionally, the Petitioner's defense was that no sexual contact occurred, not that it was consensual or limited to mere sexual contact. Thus, the evidence provided no evidentiary basis upon which the jury could have aquitted the Petitioner of

the greater offense and convicted him of the lesser. Accordingly, the Petitioner was not entitled to the lesser included offense instruction. Hopper v. Evans, supra.

The Petioner's claim that he was entitled to a lesser included offense instruction as a matter of due process is thus lacking in merit.

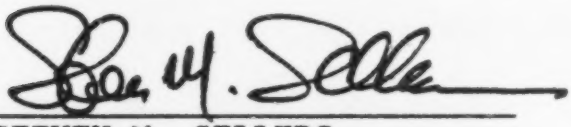
CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari to the Connecticut Supreme Court.

Respectfully Submitted,

STATE OF CONNECTICUT

RESPONDENT

By: 

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APPENDIX

APPENDIX
TABLE OF CONTENTS

PAGE

Excerpt From Petitioner's Brief In The Connecticut Appellate Court A-1

APPENDIX A

EXCERPT FROM THE PETITIONER'S BRIEF IN THE CONNECTICUT APPELLATE COURT

II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO CHARGE THE JURY ON THE LESSER INCLUDED OFFENSE OF SEXUAL ASSAULT IN THE FOURTH DEGREE

There is no doubt that in this case sexual assault in the fourth degree, Conn. Gen. Stat. §53a-73a(a)(2), is a lesser included offense of sexual assault in the first degree, Conn. Gen. Stat. §53a-70(a). "The test for determining whether one crime is a lesser included offense of another crime is whether it is possible to commit the greater offense in the manner described in the information or bill of particulars without having first committed the lesser." State v. Hodge, 201 Conn. 379, 385, 517 A.2d 621 (1986). As

applied to this case, the only factor distinguishing between sexual assault in the fourth degree and sexual assault in the first degree is that the latter adds to the former the requirement of use of force. There was no dispute on this at trial.

The state objected to the giving of the lesser included offense instruction on one ground and one ground only--that the third and fourth requirements of State v. Whistnant, 179 Conn. 576, 588, 427 A.2d 414 (1980), had not been met. Those requirements are "(3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on which the element or elements which differentiate

the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." State v. Whistnant, supra; State v. Fernandez, 5 Conn. App. 40, 45, 496 A.2d 533 (1985) (Hull, J.).

The state here argued, and the trial court found, that because the defendant had testified that he had no sexual contact whatever with Miss Butrej, the issue of whether sexual contact without force, was not truly in dispute and the jury lacked a sufficient evidentiary basis to convict of the lesser offense. (App. pp. 40-41, 87) The court based its refusal to charge on the lesser offense on its belief that "[t]here are some cases that I believe

say where the defendant takes the stand and he denies the entire incident, there is no lesser included offenses." (App. p. 87)

The defendant's failure to confess to sexual assault in the fourth degree, contrary to the view of the prosecution and the trial court, did not preclude him from having the jury instructed on the lesser offense. A defendant can be entitled to lesser included offense instructions even if he does not testify at all. E.g., State v. Burge, 195 Conn. 232, 235, 487 A.2d 532 (1985). The issue is simply whether the differentiating fact is in dispute and whether there exists a factual basis for a conviction of the lesser offense.

In this case, defense counsel vigorously cross-examined Miss Butrej

and through that cross-examination demonstrated a genuine dispute on the "use of force" element and provided a clear factual basis for conviction on the lesser offense. (App. pp.25, et seq.) The third and fourth prongs of Whistnant were met here.

The foregoing having been said it must also be noted that the defendant's trial attorney did not precisely comply with the first Whistnant prong -- that he request "an appropriate instruction" in accordance with the rules. This court and the Supreme Court have made it clear that, to be entitled to a lesser included offense charge, a defendant must in his request accurately state the law and apply it to the facts as developed at trial. State v. Merritt, 11 Conn. App. 628, 528 A.2d 863 (1987);

State v. Ostroski, 201 Conn. 534, 418 A.2d 915 (1986). Although defense counsel in this case actually submitted two written requests to charge the jury on the lesser included offense, neither of them stated the law or discussed the applicable facts. (App. pp. 2-5)

An Evans analysis would not appear to be available on this issue because of the Supreme Court's holding that there is no constitutional right to a lesser included offense instruction. State v. Jacobowitz, 194 Conn. 408, 480 A.2d 557 (1984).

In this case, however, the state clearly waived any claim it might have had to object to the giving of a lesser included offense charge on this ground. Neither the state nor the trial court expressed any difficulty whatever with

the form of the defendant's request. The only issue preserved by the state, and the only one relied upon by the trial court, was whether a defendant who denies having committed any crime can nevertheless receive the benefit of a lesser included offense instruction.

The state having waived its first prong objection, the defendant is entitled to a new trial before a jury properly instructed on sexual assault in the fourth degree.